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No. 94-1879

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1994

SYED WAHIDUL ISLAM and
MAHABUB ALAM BHUIYAN,

Petitioners,

v.

CREATIVE TOURS MICRONESIA, INC.,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether, in this negligent entrustment case arising under the law of the Commonwealth of the Northern Mariana Islands, the Ninth Circuit applied the proper standard of review in reversing the district court's conclusions concerning the existence and scope of the entrustor's duty of inquiry.

2. Whether the Ninth Circuit properly decided this case under the theory of negligent entrustment, which was the only theory pled and argued in the district court and the Ninth Circuit, rather than under another theory, such as negligent hiring, that was not raised in either the district court or the Ninth Circuit.

3. Whether, in this negligent entrustment case arising under the law of the Commonwealth of the Northern Mariana Islands, the majority of the Ninth Circuit panel correctly ruled that the entrustor of a vehicle had no initial, affirmative duty to inquire into the competence of the entrustee.

LIST OF PARTIES

Petitioners, Syed Wahidul Islam and Mahabub Alam Bhuiyan are individuals.

Respondent, Creative Tours Micronesia, Inc., is a corporation, and pursuant to Sup. Ct. R. 29.1, identifies the following entities that are related to Creative Tours, Inc., as parent corporations, subsidiaries, or affiliates: (1) Pacifico Creative Service, Inc., a Hawaii Corporation; (2) Jalpak Co., Ltd., a Japan Corporation; and, (3) Creative Resort Guam, Inc., a Guam Corporation.

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To The United States Court Of Appeals
For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This is a personal injury action arising out of a one car accident in the Commonwealth of the Northern Mariana Islands. *See* Findings of Fact, ¶ 20, Appendix to Petition at 13 ("App."). The Petitioners, Syed Wahidul Islam and Mahabub Alam Bhuiyan, were passengers in the car and were injured in the accident. *Id.* at ¶¶ 20-24, App. at 13. The car was owned by Respondent, Creative Tours Micronesia, Inc. ("Creative Tours"), *id.* at ¶ 17, App. at 12, and was driven by Mohammed Nazrul Islim (referred to as "Ronnie"), who was an employee of Creative Tours. *Id.* at ¶ 5, App. at 10. Ronnie did not have a

driver's license, *id.* at ¶ 11, App. at 11, and was driving Creative Tours' car while off-duty, contrary to the unwritten policy of Creative Tours. *Id.* at ¶ 4, App. at 10. The accident occurred after Ronnie and the Petitioners left a birthday party, *id.* at ¶¶ 18-21, App. at 12-13, and was the result of Ronnie's negligence. *Id.* at ¶ 22, App. at 13.

The Petitioners brought this diversity action against Creative Tours in the District Court for the Northern Mariana Islands, alleging Creative Tours was liable for their damages on the basis of *respondeat superior* and the negligent entrustment of the car to Ronnie. The *respondeat superior* cause of action was dismissed by the district court, *see* CR 46 (Order Granting Partial Summary Judgment, filed May 5, 1992), and the case proceeded to trial on the negligent entrustment claim. After a bench trial, the district court judge found for the Petitioners on the basis of negligent entrustment under Sections 308 and 390 of the *Restatement (Second) of Torts*. *See* Conclusions of Law, App. at 16-17. The district court concluded that Creative Tours had an affirmative duty, which it breached, to initially inquire about the experience, driving record, and qualifications of Ronnie. *Ibid.* Creative Tours appealed.

The majority of the panel of the Ninth Circuit Court of Appeals reversed the district court's judgment. The majority found that under the negligent entrustment cause of action, there was no initial affirmative duty to inquire into the competence of an entrustee. *See* Memorandum Opinion, App. at 4. Petitioners' subsequent petition for rehearing and suggestion for rehearing en banc was denied. *See* App. at 21. Not one judge of the Ninth Circuit requested a vote on the suggestion for rehearing en banc. *Ibid.*

SUMMARY OF THE ARGUMENT

1. This case presents no issue appropriate for this Court's exercise of its discretionary jurisdiction. The unpublished Memorandum Opinion deals with the duty of inquiry in a negligent entrustment case under the law of the Commonwealth of the Northern Mariana Islands. No federal law is implicated, and the panel did not depart from the usual course of judicial proceedings.

2. The majority of the panel properly applied the appropriate standard of review in negligence cases. Under this standard, the existence and extent of the standard of care is a question of law, reviewable *de novo*, while issues of breach and proximate cause are questions of fact, reviewable for clear error. The majority correctly applied this standard in reviewing and reversing the district court's conclusion concerning the duty of inquiry in this negligent entrustment case.

3. The Ninth Circuit properly decided the case under the negligent entrustment theory, which was the theory or cause of action pled, tried and argued in the district court and argued before the Ninth Circuit.

REASONS WHY THE PETITION SHOULD BE DENIED

1. This Is Not A Case Appropriate For This Court's Exercise Of Its Discretionary Jurisdiction.

This is not the type of case appropriate for this Court's exercise of its discretionary jurisdiction. *See* Sup.

Ct. R. 10.1. The Ninth Circuit's unpublished Memorandum Opinion in this diversity action concerns the standard of care in a negligent entrustment case under the law of the Commonwealth of the Northern Mariana Islands. The decision clearly does not implicate federal law.

Citing Rules 10.1(a) and 10.1(b) of the Rules of the Supreme Court of the United States, Petitioners argue that review is warranted because the Court of Appeals (1) so far departed from the accepted and usual course of judicial proceedings as to call for this Court's power of supervision and (2) decided a federal question in a way that conflicts with applicable decisions of this Court. Petn. at 2. Neither of these contentions is correct.

2. The Ninth Circuit Applied The Proper Standard Of Review.

The Petitioners assert that the majority of the Ninth Circuit panel failed to apply the proper standards in determining that the findings of the district court were clearly erroneous. *See* Petn. at 14-22. The majority, however, expressly articulated and applied the proper standard of review for negligence cases. Under this standard, the existence and extent of the standard of conduct are questions of law, reviewable *de novo*, while issues of breach and proximate cause are questions of fact, reviewable for clear error. *See* Memorandum Opinion, App. at 2.

The issue addressed by the Ninth Circuit was whether, under the law of the Commonwealth of the Northern Mariana Islands, an entrustor is under an initial, affirmative duty to inquire into the competence of

the entrustee. The majority of the panel held that there was no such duty, although once an entrustor does know facts which would cause a reasonable person to inquire further, it may be liable for failing to do so. *See* Memorandum Opinion, App. at 3-4.

Petitioners' argument that the Ninth Circuit failed to apply the correct standard of review is misplaced. The "clearly erroneous" standard of review, reflected in Rule 52(a) of the Federal Rules of Civil Procedure, does not apply to an appellate court's review of questions of law. As this Court has observed, "Rule 52(a) does not inhibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law." *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 501 (1984). In negligence cases, the Ninth Circuit follows the unremarkable rule that "[t]he existence and extent of the standard of conduct are questions of law, reviewable *de novo*," *Vollendorff v. United States*, 951 F.2d 215, 217 (9th Cir. 1991), while "issues of breach and proximate cause are questions of fact, reviewable for clear error." *Ibid.* This is the standard applied by the majority of the panel in this case and is the standard usually applied by the Courts of Appeals. *See, e.g., Fulk v. Illinois Cent. R. Co.*, 22 F.3d 120, 125 (7th Cir. 1994) (determination of any question of duty is a question of law), *cert. denied*, 115 S.Ct. 193, 130 L.Ed.2d 125, 63 USLW 3248 (1994); *McGonigal v. Gearhart Industries, Inc.*, 788 F.2d 321, 326 (5th Cir. 1986) ("Although it is clear that facts evincing negligence are to be submitted to a jury, the standard of care owed by a defendant to a plaintiff is a question of law"); *Fed. Exp.*

Corp. v. State of R.I. Dept. of Transp., 664 F.2d 830, 835 (1st Cir. 1981) ("The existence and extent of a duty of care are questions of law; whether any such duty has been breached and whether proximate cause exists are questions for the factfinder, whose determination is binding on appeal unless clearly erroneous"); *see also Restatement (Second) of Torts*, § 328B(b), (c) (in an action for negligence court determines whether facts give rise to any legal duty on part of defendant and the standard of conduct required of the defendant by the legal duty).

In this case the complaint charged Creative Tours with negligent entrustment and the Petitioners' argument, both in the district court and on appeal, was based on negligent entrustment. *See* Memorandum Opinion, App. at 4. The district court premised liability in this case on the negligent entrustment of the vehicle based on Creative Tours' breach of a duty to initially and affirmatively inquire about the experience, driving record, and qualifications of the entrustee. *See* Conclusions of Law, ¶¶ 7-11, App. at 17.

Properly relying on Sections 308 and 390 of the *Restatement (Second) of Torts*, the majority of the Ninth Circuit panel correctly held that under Commonwealth law "entrustors of chattels are under no initial, affirmative duty to inquire into the competence of their entrustees." Memorandum Opinion, App. at 3-4.[1] The majority also relied on the decision of the Commonwealth Supreme Court in *Yoo v. Quitugua*, Appeal No. 92-001 (N.M.I. May 12, 1994), *reprinted in* App. at 25-35, and cases from other

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[1] By Commonwealth statute, the *Restatement* provides the rules of decision for the Commonwealth courts. 7 CMC § 3401 (1984).

jurisdictions in arriving at its conclusion. *See* Memorandum Opinion, App. at 3-5.[2] Creative Tours, as an

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[2] In challenging this conclusion, Petitioners rely on the cases they relied on before the Ninth Circuit. In *Yoo v. Quitugua, supra,* the defendant mother had actual knowledge that her son lacked a driver's license. *See* App. at 32. *Seward v. Griffin,* 452 N.E.2d 558 (Ill. App. 1983), cited by Petitioners for the proposition that entrustment of a vehicle to an unlicensed driver is an independent act of negligence, *see* Petn. at 11, and *Owens v. Carmichael's U-Drive Autos,* 2 P.2d 580 (Cal. Ct. App. 1931), cited for the proposition that "the fact the driver was unlicensed makes for a prima facie case of negligent entrustment," *see* Petn. at 11, both involved the entrustment of a vehicle to a driver that the entrustor knew was unlicensed. *See Seward,* 452 N.E.2d at 563 (entrustor had actual knowledge that entrustee was unlicensed); *Owens,* 2 P.2d at 581 (entrustor knew that entrustee had no driver's license but possessed merely a temporary permit). The duty of inquiry was not an issue in either of these cases. Similarly, *Crockett v. United States,* 116 F.2d 646 (4th Cir. 1940), *cert. denied,* 314 U.S. 619 (1941), cited at page 13 of the Petition, was not a negligent entrustment case, the issue being whether the employee was acting within the authority granted to him by his employer so as to render the employee an agent or servant of the employer. *See* 116 F.2d at 651. The two Texas cases, *Williams v. Steves Industries, Inc.,* 699 S.W.2d 570 (Tex. 1985), and *Southwestern Bell Tel. Co. v. Davis,* 582 S.W.2d 191 (Tex. Ct. Civ. App. 1979), cited by Petitioners at 13 of the Petition are also distinguishable. Both involved accidents caused by the negligence of employees in the course and scope of employment in which the employers were liable on the basis of *respondeat superior.* In *Williams v. Steves Industries, Inc.* there are indications that the employer had knowledge that the employee did not have the requisite license for a heavy truck. The issue before each court was whether the acts of the employers were sufficiently grossly negligent so as to support an award of exemplary damages, and any comments concerning negligent entrustment were, in these cases, simply dicta. There is also no indication that they were decided under *Restatement* principles.

entrustor, was, therefore, under no affirmative duty to inquire into the entrustee's competence before entrusting him with a vehicle. Memorandum Opinion, App. at 4-6. The majority emphasized that the case was tried and argued on the basis of negligent entrustment and not negligent hiring, a different tort. Memorandum Opinion, App. at 4. "Whatever Creative Tours' duty might have been in employing Islim, it had no affirmative duty of inquiry, in its role as owner of the Toyota Corolla, prior to entrusting the car to Islim." *Ibid.* The majority carefully pointed out that nothing in its disposition " 'shields an employer from liability' for 'fail[ing] to inquire about an employee's license to drive,' " *ibid.* (quoting Dissent), and that "[e]mployers may or may not be liable under theories not at issue here." *Ibid.* The majority concluded that it was "simply apply[ing] to this car owner the same rule that applies to all other car owners." Memorandum Opinion, App. at 4-5. The issue of negligent hiring had not been presented to the district court or the Ninth Circuit and did not form the bases of their decisions.

The focus on negligent entrustment in this case was understandable given the fact that the accident occurred while the entrustee was driving from a birthday party, *see* Findings of Fact, ¶¶ 17-21, App. at 12-13, contrary to Creative Tours' unwritten policy limiting the use of vehicles to business purposes only, *id.*, ¶ 4, App. at 10, and clearly far removed from the scope of his employment.

With the basis for the district court's finding of negligence eliminated as a matter of law, the majority of the panel also rejected Petitioners' argument that the judgment could be affirmed "in any event," Memorandum Opinion, App. at 5, because the record contains sufficient

evidence to support the district court's finding that Creative Tours had reason to know of the entrustee's incompetence. *Ibid.* The majority analyzed each of the points advanced by Petitioners, in a list "notable for its utter unremarkableness," Memorandum Opinion, App. at 6, and correctly found that "[n]othing in the list offers any affirmative reason to suspect Ronnie could not drive competently." *Ibid.*

In conclusion, the panel applied the proper standard of review in reversing the judgment of the district court.

3. The Ninth Circuit Properly Decided The Case Under The Theory Of Negligent Entrustment.

Petitioners argue that the Ninth Circuit erred in deciding the case under the negligent entrustment theory or cause of action. *See* Petn. at 19-22. The case, however, was pled, tried, argued and decided as one of negligent entrustment. *See* Memorandum Opinion, App. at 4. The complaint alleged only two theories: negligent entrustment and *respondeat superior.* The *respondeat superior* claim was dismissed prior to trial, and the case proceeded to trial on the negligent entrustment theory.

Petitioners assert that the Ninth Circuit was incorrect in deciding the case on the basis of the negligent entrustment cause of action and not on the basis of an undefined, unpled, and unargued theory of "negligent hiring." Petitioners state that "[t]his device of dissecting the roles of an employer in order to avoid dealing with one of the key facts in the case is inconsistent with and contrary to procedural and substantive law." Petn. at 20. Petitioners note that the complaint alleged that Ronnie was an

employee and that Creative Tours negligently entrusted the car to him. Petn. at 20. They state that "[the] majority decision implies that had the plaintiffs used the word 'employee' instead of 'operator' in paragraph 9, then the decision might be different." *Ibid.*

The panel, however, did nothing of the sort. The majority adverted to the fact that Creative Tours was Ronnie's employer and concluded that under negligent entrustment, employer-entrustors are treated just like any other entrustor. Memorandum Opinion, App. at 5; *see also* App. at 4 ("Whatever Creative Tour's duty might have been in employing Islim, it had no affirmative duty of inquiry, in its role as owner of the Toyota Corolla, prior to entrusting the car to Islim"). The duty that was tried and argued was the duty of an owner of a chattel.

The entire case was presented on a negligent entrustment theory, not on a negligent hiring theory. This was the view of the district court, which decided the case on the basis of negligent entrustment. The arguments presented by the parties before the district court and the Ninth Circuit were based on negligent entrustment, and both the majority and dissenting opinions viewed the issue as one of negligent entrustment. *See* Memorandum Opinion, App. at 4 ("Islam's complaint charged Creative Tours with negligently entrusting an automobile to Ronnie Islim, not with negligently hiring him, and his argument, both in the district court and on appeal, was based on negligent entrustment"). Creative Tours has never conceded nor did the Ninth Circuit hold that liability could be imposed under a different theory or cause of

action, such as negligent hiring.[3] The issue was not raised, tried or argued.

Petitioners assert that the majority's decision "rests on a theory that: (1) was never briefed or argued by either party, (2) is contrary to the letter and spirit of the Federal Rules of Civil Procedure, and (3) ignores facts that were uncontradicted at trial and part of the findings and conclusions." Petn. at 22. This statement is difficult to understand, since the case was decided on the one theory that was briefed and argued: negligent entrustment. Petitioners' references to cases regarding the pleading of causes of action, *see* Petn. at 20-21, are inapposite, since an alternative theory or cause of action was not presented to the district court or to the Ninth Circuit.

Even in the Petition for Writ of Certiorari, Petitioners' argument is firmly couched in terms of negligent entrustment. While alluding to the tort of negligent hiring, *see, e.g.*, Petn. at i, "Questions Presented For Review" ("Whether the circuit court erred in basing its decision on the conclusion that plaintiffs pled a theory of negligent entrustment as distinguished from negligent hiring"), the Petitioners have not presented this Court, and did not present the Ninth Circuit, with an argument setting forth the basis, the elements, and the applicability of this separate theory or cause of action. In short, the Petitioners have not delineated the separate tort theory which they now generally argue the Ninth Circuit should have considered. The liberal rules of pleading do not

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[3] The majority merely pointed out that "[e]mployers *may* or *may not* be liable under theories not at issue here." Memorandum Opinion, App. at 4 (emphasis added).

permit plaintiffs to wait until the last minute to refine the theories on which they intend to build their case where this would unfairly surprise defendants. *Evans v. McDonald's Corp.*, 936 F.2d 1087, 1091 (10th Cir. 1991).

In this case it is clear that Creative Tours built and premised its defense and appeal on the proposition that under the negligent entrustment theory it was not liable to Petitioners in the absence of actual knowledge of Ronnie's incompetence and that it had no initial, affirmative duty to inquire into Ronnie's qualifications under the negligent entrustment theory. This was the focus of Creative Tours' appeal, it was the focus of Petitioners' arguments before the court of appeals, and it was the basis on which the court of appeals decided the case. The Petitioners did not move to amend their complaint, and since the "negligent employment" theory was not tried by either express or implied consent, and there was no briefing or evidence at trial concerning this theory, Petitioners' references to Rule 15(b) of the Federal Rules of Civil Procedure at page 21 of their Petition are inapposite. *Campbell v. Trustees of Leland Stanford Junior University*, 817 F.2d 499, 596 (9th Cir. 1987).

Had the issue of employer's liability been litigated, the defense in the case would probably have been significantly different. Petitioners, for example, emphasize the Commonwealth's hiring statutes. *See* Petn. at 17-19. As pointed out by the majority of the panel, the fact that there was no employment contract did not put Creative Tours on notice of anything about the entrustee's driving ability when it entrusted the vehicle to him. Petitioners now claim in their Petition that Creative Tours should be liable because it failed to comply with the hiring statutes.

However, since this issue was irrelevant to a negligent entrustment claim, the record is silent as to what information would have actually been required by the government, and specifically what would have been required with respect to a person hired "to meet tour groups to assist with baggage and check-in at the airport and at the several hotels in Saipan where the tourists stayed." Findings of Fact, ¶ 5, App. at 10. Those facts would have been developed at trial if a negligent employment theory had been pled and tried. Since that issue was neither pled nor tried, the facts developed at trial did not go to this issue, and it would have been improper to impose liability on a theory that Creative Tours did not have the opportunity to defend against in the trial court or the Ninth Circuit.[4]

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[4] Petitioners' discussion of the Commonwealth of the Northern Mariana Islands' immigration requirements implicitly speculates that had the job application been submitted it would have contained information regarding the entrustee's driving abilities. *See* Petn. at 17-18. The requirements of the immigration authorities, however, were not introduced into evidence by the Petitioners. There was simply no evidence introduced on this issue. With respect to compliance with the certification process, it was indicated at trial that Ronnie was involved in a wage dispute and that the Attorney General was requesting assistance in placing people, such as Ronnie, in jobs so that they could remain in the Commonwealth to testify. It was under this situation that Ronnie approached Creative Tours for a job, and it was Creative Tours' understanding that the job certification process need not be satisfied because of Ronnie's pending litigation. *See* Trial Transcript at 209 (Testimony of Kentaro Nezu); *id.* at 12 (Testimony of Joaquin Sablan).

The complaint in this case was based on allegations of negligent entrustment, governed by Sections 308 and 390 of the *Restatement (Second) of Torts*. This was the legal theory that persisted through trial and the appeal of this matter, and the panel appropriately based its decision on this theory. The theory perseveres in the Petition, which, although mentioning negligent hiring (without defining the tort), is actually based on negligent entrustment arguments that were rejected by the majority of the Ninth Circuit panel.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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